Editor's note: Appealed -- aff'd, Civ.No. 86-380-C (E.D.Ok. Oct. 5, 1987)

TURNER BROTHERS, INC.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 85-408 Decided June 26, 1986

Appeal from a decision by Administrative Law Judge Frederick A. Miller affirming Notice of Violation No. 84-3-38-3 (2 of 2) and Cessation Order No. 84-3-38-4 issued by the Office of Surface Mining Reclamation and Enforcement.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Abatement: Generally -- Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally -- Surface Mining Control and Reclamation Act of 1977: Inspections: Generally -- Surface Mining Control and Reclamation Act of 1977: Public Health and Safety: Generally

   Where a 10-day notice to the state regulatory authority is issued in response to a violation found during an oversight inspection, OSM may issue an NOV if the state fails to take "appropriate action" to abate the violation within 10 days. An NOV issued by OSM will be upheld where it appears that a state NOV issued in response to the 10-day notice was not the appropriate action to secure abatement in view of the outstanding (unterminated) state NOV for the same violation dated a year previously.

APPEARANCES: Robert J. Petrick, Esq., and Margaret Swimmer, Esq., Muskogee, Oklahoma, for appellant; Gerald Thornton, Esq., Office of the Field Solicitor, Tulsa, Oklahoma, and Milo C. Mason, Esq., Office of the Solicitor, Division of Surface Mining, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Turner Brothers, Inc., has appealed from Administrative Law Judge Frederick A. Miller's decision holding that the Office of Surface Mining Reclamation and Enforcement (OSM) properly issued Notice of Violation (NOV) No. 84-3-38-3 (2 of 2) dated February 2, 1984, citing Turner Brothers for

failure to construct a sedimentation pond in compliance with Oklahoma Regulations (OR) 816.42(a)(5) and 816.46. The decision also affirmed the Cessation Order (CO) No. 84-3-38-4 issued February 25, 1984, for failure to abate the violation set forth in the previously issued NOV. Judge Miller concluded that OSM's action was proper under section 521(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a) (1982), and regulations promulgated thereunder.

In January 1984, OSM inspected the mining operations conducted by Turner Brothers at the Heavener Mine No. 3011 pursuant to a citizen's complaint. OSM discovered that Turner Brothers had constructed a sedimentation pond (pond 5) that violated OR 816.42(a)(5) and OR 816.46 by lacking a proper principal spillway, a proper emergency spillway, and adequate erosion control (Tr. 14-16). Additionally, the sedimentation pond had not been certified by a professional engineer as being in compliance with those requirements. Consequently, OSM issued a 10-day notice on January 12, 1984, to the Oklahoma Department of Mines and Minerals (ODOM), specifying the violations found.

On January 25, 1984, ODOM responded to OSM's 10-day notice by issuing its own NOV No. 84-04-06 (violation 6 of 10) for improperly constructed sedimentation ponds. This NOV required abatement of the violation by February 20, 1984. Subsequently, OSM determined ODOM had not taken appropriate action to cause the violation to be corrected and, hence, conducted another inspection.

Upon returning to Turner Brothers' Heavener Mine No. 3011 on February 2, 1984, the OSM inspector, James Petitto, found that no action had been taken to correct the sedimentation pond's design deficiencies. Accordingly, he issued NOV No. 84-3-38-3 (2 of 2) for failure to conduct surface mining operations in compliance with Oklahoma regulations. The NOV required abatement of the violation by February 21, 1984. Inspector Petitto conducted a follow-up inspection on February 25, 1984, and discovered that Turner Brothers had failed to abate the violation. He then issued CO No. 84-3-38-4 for failure to perform the corrective action required by NOV No. 84-3-38-3 (2 of 2).

A hearing on the issue of whether NOV No. 84-3-38-3 (2 of 2) and CO No. 84-3-38-4 were properly issued by OSM took place before Judge Miller on August 2, 1984, in Louisville, Kentucky.

Appellant raises three grounds for appeal. First, appellant contends OSM improperly issued the NOV (and subsequent CO for failure to abate) under section 521(a) because ODOM, in response to the 10-day notice from OSM, had conducted an inspection and issued an NOV for pond 5. Turner Brothers argues this constituted "appropriate action" to cause the violation to be corrected and, hence, no Federal inspection by OSM was authorized under section 521(a). Further appellant argues that where ODOM has taken action in response to a 10-day notice, OSM must either accept that action or, in the alternative, initiate proceedings under the regulations at 30 CFR Part 733 to substitute Federal enforcement of the state program. In addition, appellant argues that OSM is estopped to issue an NOV for an improperly constructed sedimentation pond in view of the failure to cite this pond during prior inspections.

[1] The focus of this appeal is upon how section 521(a) of SMCRA generally, and the term "appropriate action" specifically, should be interpreted and applied. That section provides in pertinent part:

> Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. [Emphasis added.]

30 U.S.C. § 1271(a) (1982).

The phrase "appropriate action" also appears in the regulations promulgated by the Department to implement section 521. The relevant portions of 30 CFR 842.11(b)(1)(ii)(B) vary little from section 521, providing a Federal inspection shall be conducted when:

> The authorized representative has notified the State regulatory authority of the possible violation and within 10 days after notification the State regulatory authority has failed to take appropriate action to have the violation abated and to inform the authorized representative that it has taken such action or has a valid reason for its inaction * * *.

The regulation at 30 CFR 843.12(a)(2) governs the course of action to be pursued where the state regulatory authority fails to take "appropriate action:"

> When, on the basis of any Federal inspection other than one described in paragraph (a)(1) of this section, an authorized representative of the Secretary determines that there exists a violation of the Act, the State program, or any condition of a permit or an exploration approval required by the Act or the State program which does not create an imminent danger or harm for which a cessation order must be issued under 30 CFR 843.11, the authorized representative shall give a written report of the violation to the State and to the permittee so that the appropriate enforcement action can be taken by the State. Where the

State fails within ten days after notification to take appropriate action to cause the violation to be corrected, or to show good cause for such failure, the authorized representative shall reinspect and, if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate. [Emphasis added.]

Hence, the issue is whether ODOM took "appropriate action" to abate the violations identified in the 10-day notice prior to the OSM inspection of February 2, 1984, and issuance of NOV 84-3-38-3 (2 of 2). If ODOM failed to take appropriate action, then the NOV and the subsequent CO for failure to abate must be sustained.

The meaning of "appropriate action" is defined neither in SMCRA nor in the regulations promulgated thereunder. The preamble to the published final regulation indicates that OSM's failure to define that term was deliberate. OSM responded as follows to a comment that OSM should specify in clearer detail what "appropriate action" the state must take in response to a 10-day notice: "OSM also disagrees with the suggestion that 'appropriate action' should be spelled out in detail. The crucial response of a State is to take whatever enforcement action is necessary to secure abatement of the violation." 47 FR 35627-28 (Aug. 16, 1982) (emphasis added). 1/ We find that use of the word "appropriate" requires OSM to exercise its discretion in determining whether the state's response to its 10-day notice is such that OSM must reinspect the site of the violation and issue either an NOV or a CO, depending upon the circumstances. We further find that OSM, in evaluating the state's response to a 10-day notice, must determine whether that response is calculated to secure abatement of the violation. See Thomas J. Fitzgerald, 88 IBLA 24, 29 (1985).

Inspector Petitto testified that ODOM "had not taken appropriate action" as a result of misjudgment on the state inspector's part (Tr. 17). The problem was identified by Petitto as "confusion with the [ODOM] inspector over which pond he was looking at" (Tr. 24). Petitto testified that he spoke with the inspector's supervisor who agreed to try to straighten out the problem and get back to him with a resolution within 48 hours (Tr. 24). Further, Petitto testified "[w]e couldn't get any response from the state and their actions appeared to be inappropriate because they were looking somewhere up in section 27, which is about a mile and a half from where this pond is" (Tr. 25-26). Testifying for appellant, William Thomas Turner acknowledged the existence of other ponds in section 27 (Tr. 47-48), but he maintained there was no confusion over the identity and location of pond 5 cited in the NOV (Tr. 48-49). The testimony of Michael S. Roscoe confirmed that the designation "pond 5" on the state NOV was understood to refer to the particular pond in issue (Tr. 50).

1/ There is support for this in the legislative history of section 521(a): "[T]he Secretary must notify the State of such violations and within ten days the State must take action to have the violations corrected." H. Rep. No. 45, 94th Cong., 1st Sess. 205 (1975).

Roscoe acknowledged in his testimony the existence of an earlier state violation concerning pond 5 (NOV 83-1-4) which was terminated by the state on August 12, 1984, after the pond had been reconstructed (Tr. 54). The issuance of NOV 83-1-4 regarding pond 5 on January 4, 1983, was also acknowledged in appellant's briefs before the Judge Miller and before the Board, although counsel indicates this state NOV was terminated on March 12, 1984 (rather than August 12, 1984).

The testimony established there was less confusion than Inspector Petitto perceived regarding the identification of pond 5 in the NOV issued by ODOM (84-04-06 (6 of 10)). However, the testimony and the pleadings disclose that the same pond 5 was the subject of an NOV (83-1-4) issued by ODOM a year earlier which was not terminated until March 12, 1984, long after issuance of the 10-day notice. Thus, although ODOM had been aware of the problem with the pond for over a year, they had not succeeded in abating the violation. In this context, we must affirm the finding of the Administrative Law Judge that the record supports the conclusion of OSM that ODOM had not taken appropriate action to cause the violation to be corrected in response to the 10-day notice. We find nothing in Donald St. Clair, 77 IBLA 283, 90 I.D. 496 (1983), cited by counsel for appellant, which would mandate a different result. Indeed, that case supports a broad scope of discretion in OSM in determining whether the state response is appropriate.

Appellant argues that once any action is taken by the state regulatory authority in response to a 10-day notice, the oversight role of OSM is limited to a finding that the state is not effectively enforcing the state regulatory program and substitution of Federal enforcement pursuant to the procedures outlined in 30 CFR Part 733 implementing section 521(b) of SMCRA. 2/ This

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2/ Section 521(b) of SMCRA, 30 U.S.C. § 1271(b) (1982), provides as follows:

"Whenever on the basis of information available to him, the Secretary has reason to believe that violations of all or any part of an approved State program result from a failure of the State to enforce such State program or any part thereof effectively, he shall after public notice and notice to the state, hold a hearing thereon in the State within thirty days of such notice. If as a result of said hearing the Secretary finds that there are violations and such violations result from a failure of the State to enforce all or any part of the State program effectively, and if he further finds that the State has not adequately demonstrated its capability and intent to enforce such State program, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Secretary that it will enforce this chapter, the Secretary shall enforce, in the manner provided by this chapter, any permit condition required under this chapter, shall issue new or revised permits in accordance with requirements of this chapter, and may issue such notices and orders as are necessary for compliance therewith: Provided, That in the case of a State permittee who has met his obligations under such permit and who did not willfully secure the issuance of such permit through fraud or collusion, the Secretary shall give

Board has previously upheld the authority of OSM to issue an NOV pursuant to section 521(a) of SMCRA and the regulation at 30 CFR 843.12(a)(2), quoted above, in a state which has obtained primary enforcement jurisdiction, 3/ where a violation is found as a result of an oversight inspection and the state failed to take action to ensure abatement. Shamrock Coal Co. v. OSM, 81 IBLA 374 (1984). 4/ Indeed, the legislative history of section 521 of SMCRA supports a conclusion that substitution of Federal enforcement of a state regulatory program pursuant to section 521(b) is not the only remedy for violations disclosed in a Federal oversight inspection:

> The Federal enforcement system contained in this section while predicated upon the States taking the lead with respect to program enforcement, at the same time provides sufficient Federal backup to reinforce and strengthen State regulation as necessary. Federal standards are to be enforced by the Secretary on a mine-by-mine basis for all or part of the State as necessary without a finding that the State regulatory program should be superseded by a Federal permit and enforcement program. [Emphasis added.]

H. Rep. No. 896, 94th Cong., 2nd Sess. 119 (1976); S. Rep. No. 128, 95th Cong., 1st Sess., 88 (1977). See also 48 FR 9199 (March 3, 1983). 5/

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fn. 2 (continued)
the permittee a reasonable time to conform ongoing surface mining and reclamation to the requirements of this chapter before suspending or revoking the State permit."
(Emphasis added.)

3/ The Oklahoma State Program has been approved by the Department. 30 CFR 936.10. Subsequent to issuance of the NOV and CO involved in this appeal, direct Federal enforcement of the approved Oklahoma regulatory program was substituted for enforcement by ODOM. 30 CFR 936.17 (49 FR 14688 (Apr. 12, 1984)).

4/ Appeal filed, Shamrock Coal Co. v. Clark, Civ. No. 84-238 (E.D. Ky., July 27, 1984).

5/ Section 504(b) of the Act, 30 U.S.C. § 1254(b) (1982), provides: "In the event that a State has a State program for surface coal mining, and is not enforcing any part of such program, the Secretary may provide for the Federal enforcement, under the provisions of section 521, of that part of the State program not being enforced by such State." Concerning this section the Senate report stated:

"The committee fully intends that under subsection 404(b) [the present 504(b)] the Secretary will use the enforcement authority granted him under subsections 421(a)(1) through (4) [the present sections 521(a)(1)-(4)], if a State with an approved program fails to enforce against an operator who is violating the Act."

S. Rep. No. 128, 95th Cong., 1st Sess. 72 (1977) (emphasis added).

The distinction between Shamrock and the present case is that ODOM in this case issued an NOV whereas in Shamrock no enforcement action was taken by the state regulatory agency in response to the 10-day notice. We are unable to accept appellant's argument that any action taken by ODOM in response to the 10-day notice without regard to how appropriate it is to abate the violation will necessarily preempt the authority of OSM to conduct an oversight inspection and cite a violation which was the subject of the 10-day notice. We will affirm the issuance of an NOV and a subsequent CO for failure to abate where the record supports the finding of OSM that the state regulatory action failed to take appropriate action to ensure abatement of a violation in response to a 10-day notice, notwithstanding the fact that the state did issue an NOV for the violation. 6/

We find no merit to appellant's allegation of an estoppel. As the Administrative Law Judge correctly held, the failure of OSM to cite the violation sooner, especially in the absence of a prior OSM inspection of pond 5, cannot form the basis for a valid claim of estoppel.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge upholding NOV No. 84-3-38-3 and CO No. 84-3-38-4 is affirmed.

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C. Randall Grant, Jr.
Administrative Judge

We concur:

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John H. Kelly
Administrative Judge

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Will A. Irwin
Administrative Judge

6/ As we stated in Thomas J. Fitzgerald, supra at 29 n.4: "The fact that the State may be taking some action against the operators does not automatically mean that the action taken is 'appropriate.'"